Filed 12/30/04 P. v. Chestra CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CHESTRA, Defendant and Appellant.	A103173 (San Mateo County Super. Ct. No. SC052665)

Robert Chestra appeals from a judgment entered after a jury convicted him of second degree robbery. (Pen. Code, § 212.5, subd. (c).)[1] He contends his conviction must be reversed because (1) the trial court erred when it denied his motion to suppress, (2) the trial court instructed the jury incorrectly, and (3) the prosecutor committed misconduct during final argument. We conclude there were no prejudicial errors committed at appellant's trial and will affirm.

[1] Unless otherwise indicated, all further section references will be to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2002, near 1:15 p.m., appellant walked into the Washington Mutual Bank in Burlingame and got into line. When appellant's turn arose, he gave the teller, Jinky Lasat, a note that said, "I have a gun. Give me your 100s and 50s."

Lasat considered pushing her alarm, but she was afraid that if she did, appellant might shoot her. She decided to stall him instead. Lasat returned the note to appellant and told him, "I don't know what the note sa[ys]." Appellant replied, "You know what it said." Believing appellant was serious about robbing the bank, Lasat gave him all the $100 and $50 bills in her drawer; a total of $1,100. Appellant put the money into his pants pocket and left. He walked about a block and a half to where he had parked his car, a Toyota 4Runner. Appellant got into his car and drove away.

Meanwhile, Lasat screamed to her manager that she had been robbed. She called the police and provided a description of appellant.

A few minutes later, at 1:28 p.m., Burlingame Police Sergeant Michael Matteucci was on patrol when he heard a report that the Washington Mutual Bank had been robbed. The report provided a description of the robber and said he claimed to be armed.[2] Matteucci drove toward the bank When he was about four blocks away, he saw a Toyota 4Runner driving toward him. The driver, appellant, matched the description of the robber, so Matteucci turned his patrol car around and started to follow the 4Runner. After calling for and obtaining back-up, Matteucci stopped the 4Runner and detained appellant. Another officer brought Lasat to the scene of the stop. She identified appellant as the man who had robbed her just minutes earlier.

A police investigator questioned appellant about the robbery the following day. He freely admitted the crime, telling the investigator he had chosen that particular bank because he "ran out of gas" nearby. Appellant said he planned to use the money he obtained to "eat," "party," and "smoke."

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[2] We will discuss the precise description that was provided, and the steps Sergeant Matteucci took to stop and detain appellant, later in this opinion.

Based on these facts, an information was filed charging appellant with second degree robbery. (§ 212.5, subd. (c).) As is relevant here, the information also alleged appellant had three prior strikes within the meaning of the three strikes law (§ 1170.12, subd. (c)(2)), that appellant had three prior serious felony convictions (§ 667, subd. (a)), and that appellant had served three prior prison terms (§ 667.5, subd. (a)).

The case proceeded to trial where the prosecution presented the evidence set forth above. The jurors convicted appellant after deliberating less than one hour. In a court trial that followed, the court found the strike, prior conviction, and prior prison term allegations to be true. Subsequently, the trial court sentenced appellant to 15 years plus 25 years to life in prison. This appeal followed.

II. DISCUSSION

A. Motion to Suppress

Appellant filed a motion prior to trial arguing that his detention by Sergeant Matteucci was illegal, and therefore that his identification by the teller Lasat must be suppressed. At the hearing on appellant's motion, the following evidence was adduced.[3]

Sergeant Matteucci was on patrol when he heard a report that the Washington Mutual Bank had been robbed. The report described the robber as a black male, approximately 30 years of age, wearing blue jeans, a black t-shirt, and a black baseball cap. According to the report, the robber said he was armed.

Matteucci drove toward the bank. When he was less than one half mile away, he saw a Toyota 4Runner driving toward him; i.e. away from the bank. Matteucci could see that the driver, appellant, was a black man in his 30's who was wearing a black t-shirt and a black "beanie-type" hat.

Matteucci believed appellant might be the bank robber, so he decided to follow him. To ensure his own safety, Matteucci called for backup.

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[3] The evidence presented at trial varied in some minor respects from the evidence presented at the hearing on the motion to suppress. The parties agree that our review of the court's suppression ruling must be based on the evidence presented at the hearing on the motion to suppress. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77-78, fn. 18.)

Matteucci followed the 4Runner through the streets of Burlingame and onto Highway 101. When other officers joined in the pursuit, Matteucci activated his lights and stopped the 4Runner. Appellant pulled to the side of the highway. Because the robber was reported to have said he was armed, Matteucci and the other officers used a "high risk stop." They ordered appellant out of his vehicle at gun point.

Appellant got out of his 4Runner. Matteucci saw that appellant, like the robber, was wearing jeans. Matteucci walked past appellant and looked inside the 4Runner through the open driver's side window. He saw a black baseball cap on the passenger side floorboard.

The officers ordered appellant to walk behind the 4Runner and to lie down on the ground. Appellant complied. As he did so, the demand note appellant had used to rob the bank fell out of his pants. One of the officers retrieved it. Officer Matteucci also saw that money was falling out of appellant's pants.

About 15 minutes later, Officer Brian McKague arrived at the scene with Lasat. McKague asked Matteucci to put the black baseball cap on appellant. Matteucci retrieved the cap from the 4Runner and placed it on appellant's head. Lasat identified appellant as the bank robber. Later the officers searched appellant's pants. They found $1,100 in cash.

The trial court considering this evidence denied appellant's motion to suppress ruling Officer Matteucci's observations sufficient to support the initial detention and the subsequent arrest and search.

Appellant now contends the trial court erred when it denied his motion to suppress. He raises three issues that we will address in turn.[4]

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[4] Although not raised as a separate argument that would compel a reversal of his conviction, appellant contends the People should be "estopped" from relying on certain aspects of Sergeant Matteucci's testimony at the suppression hearing because he testified differently at a subsequent pretrial hearing and at trial. We reject this argument for two reasons. First appellant has not cited any authority that holds the People should be "estopped" under these circumstances. Indeed, as appellant acknowledges, our review of the trial court's ruling on the motion to suppress must be based solely on the evidence presented at the hearing on that motion. (*In re Arturo D., supra,* 27 Cal.4th at pp. 77-78,

1. Validity of the Detention

Appellant contends his initial detention by Sergeant Matteucci was illegal because it was not supported by reasonable cause.

A detention is constitutionally reasonable if the circumstances known or apparent to the detaining officer include "specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. Not only must he subjectively entertain such a suspicion, but it must be objectively reasonable for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience, to suspect the same criminal activity and same involvement by the person in question." (*People v. Aldridge* (1984) 35 Cal.3d 473, 478, internal citation omitted.) On appeal, the trial court's factual findings concerning a detention, express or implied, must be upheld if they are supported by substantial evidence. (*People v. Loewen* (1983) 35 Cal.3d 117, 123.) However this

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fn. 18.) Second and more importantly, Sergeant Matteucci's testimony was not inconsistent as appellant alleges. Appellant's primary contention is that Matteucci testified falsely at the suppression hearing when he said he first saw the black baseball hat on the passenger side floorboard of appellant's car while removing appellant from the car after the stop. According to appellant, this was inconsistent with Matteucci's testimony at a pre-trial in limine hearing where Matteucci said he was standing behind the door of his patrol car when he ordered appellant out of his car. However the relevant portion of the suppression hearing transcript shows there was no inconsistency:

"Q. [Prosecutor] When did you personally notice the black baseball cap?

"A. [Sergeant Matteucci] As I was -- as we were taking Mr. Chestra out of the vehicle, as I walked past the vehicle, I could see it through the passenger's window.

"Q. Was it evident to you right away?

"A. Actually, I want to correct that. I saw it through the driver's door *as I walked past the driver*. So, I could see through to the passenger side of the floorboard.

"Q. He's out of the car?

"A. He's out of the car."

court must exercise its independent judgment to determine whether the detention was constitutionally reasonable as measured by the facts found by the trial court. (*Ibid.*)

Here, the evidence shows, and appellant concedes that Sergeant Matteucci had reasonable cause to believe that a crime, specifically a bank robbery, had been committed. The pivotal question is whether Matteucci had reasonable grounds to suspect that appellant was involved in that crime.

The police broadcast described the robber as a black male, approximately 30 years of age, wearing blue jeans, a black t-shirt, and a black baseball cap. According to Matteucci, the driver of the 4Runner matched that description in several important respects: i.e., he was a black man, in his 30's, wearing a black t-shirt and some sort of black head covering. Furthermore, appellant was driving very near to, but away from the bank that had just been robbed. While the head covering appellant was wearing did not match precisely that worn by the robber, as Matteucci explained, the "[h]at could have been turned around backwards. He could have taken it off."

We conclude the facts apparent to Officer Matteucci were sufficient to support appellant's initial detention.

Our conclusion is fully consistent with case law. In *People v. McCluskey* (1981) 125 Cal.App.3d 220, the defendant robbed a store and fled on foot. The victim called the authorities and provided a description of the robber. A dispatcher broadcast the description including the robber's height, hair color and style, approximate age, the color of his jacket, and his ethnicity. A few minutes later, a deputy sheriff passed a car driving in the opposite direction. The deputy believed the person in the passenger seat matched the robber's description, so he stopped the car. The trial court granted a motion to suppress ruling the stop had been based solely on the defendant's ethnicity. The appellate court reversed ruling that the stop was valid because it was based on "a combination of several factors: [the deputy sheriff's] knowledge a robbery had recently

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Fairly read, nothing in this passage is inconsistent with Sergeant Matteucci's testimony at the subsequent in limine hearing.

occurred in the vicinity, his observation the suspect's car was traveling in a direction consistent with the suspect's involvement in the robbery and his receipt of the suspect's description which included ethnic origin, attire, sex and age." (*Id.* at pp. 226-227.)

These same factors are present here. Sergeant Matteucci stopped appellant because his sex, approximate age, ethnic origin, and attire all matched that of the bank robber and because he was driving a car near to but departing from the scene of the crime. As in *McCluskey,* we conclude the evidence was sufficient to justify Officer Matteucci's suspicion that appellant had been involved in the robbery.

Appellant contends the "fact that [he] was near the bank within a few minutes of the report of the robbery did not appreciably increase the cause to believe that he was the robber." This is clearly incorrect. It has long been recognized that a person's proximity to a crime can lend support to his possible involvement in that crime. (See, e.g., *People v. McCluskey, supra,* 125 Cal.App.3d at pp. 226-227.)

Next, appellant suggests that Sergeant Matteucci detained him solely because he was black. This is factually incorrect. Sergeant Matteucci testified that he detained appellant because of his race, his sex, his age, his clothing, his proximity to the bank, and his direction of travel. Appellant's argument on this point is unsupported.

Appellant also contends it is highly unlikely that Sergeant Matteucci could in fact have seen what appellant was wearing through the windshield of a moving car. However, credibility determination such as this are for the trier of fact. (*People v. Lawler* (1973) 9 Cal.3d 156, 160.)

We conclude appellant's initial detention was proper.

2. Validity of the Hat Seizure

Appellant contends the police lacked probable cause to seize the baseball hat that was found on the passenger side floorboard of his car. According to appellant, his subsequent identification by Lasat, his arrest, and all other evidence that was obtained as a result of the arrest must be suppressed as the product of that illegal seizure.

We question whether appellant can validly raise this issue. Appellant's motion to suppress in the trial court was based on the theory that the police lacked cause to detain

him initially. Appellant did not expressly argue that the police lacked probable cause to seize the hat. It is probable appellant has waived this argument because he failed to raise it in the trial court. However, we decline to base our decision on this ground and will address appellant's argument on its merits.

To justify a seizure, police officers must lawfully be in the position from which they view an item, and the incriminating character of the item as evidence of a crime must be immediately apparent. (*Horton v. California* (1990) 496 U.S. 128, 136-137.) The incriminating nature of an item is immediately apparent when the police have probable cause to believe it is evidence of a crime. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375.) "[P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief, that certain items may be . . . useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." (*Texas v. Brown* (1983) 460 U.S. 730, 742, internal citation and punctuation omitted.)

Here, as we have discussed, before stopping appellant, Matteucci ascertained that appellant matched the description of the robber in several respects. He was a black man in his 30's wearing a black t-shirt, and he was driving a car near to but away from the scene of the bank robbery. When Sergeant Matteucci stopped appellant and ordered him out of his car, another piece of evidence emerged. Appellant, like the robbery suspect, was wearing jeans. After appellant was out of the car, Matteucci looked through the open driver's side window and saw a black baseball hat on the passenger side floor. The hat matched the description of that worn by the robber. Matteucci did not seize the hat at that point. Instead he ordered appellant to walk to the rear of his car and to lie down on the ground. As appellant did so, the demand note appellant had used to rob the bank fell out of his pants. In addition, money was falling out of appellant's pants. Another officer brought Lasat to the scene. Matteucci retrieved the hat from the car and placed it on appellant's head.

Thus, prior to seizing the hat, Matteucci knew appellant matched the description of the suspect in virtually *every* respect, that he had been seen near to but was driving away

from the scene of the crime, that he had a robbery demand note, and that money was falling out of his pants. Clearly, Matteucci had probable cause to seize the hat.[5]

3. Ineffective Assistance of Counsel

Appellant contends that if this court were to hold that he waived the right to argue the police lacked probable cause to seize the hat from the car, then trial counsel was constitutionally ineffective because she failed to raise that issue in the trial court. Because we have not based our decision on waiver, we need not address the ineffective assistance claim.

B. Instructions

Appellant was charged with second degree robbery and the trial court instructed the jury on the elements of that offense. One of those elements is that the defendant took property from another "either by force or fear . . . ." (CALJIC No. 9.40.)

Appellant now contends the trial court should have instructed the jury on the lesser offense of grand theft because there was no evidence that he used force when committing the robbery and there was conflicting evidence about whether the teller, Lasat, was afraid for her own safety.

A trial court must instruct the jury on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.)

We will assume, for purposes of this argument that appellant did not use force when committing the robbery. In addition, as we will discuss below, there was conflicting evidence about whether Lasat was concerned for her own safety. However even given this premise, appellant's argument is unpersuasive. By statute, two types of fear can support a robbery. It may be "1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or [¶]

[5] Appellant also seems to contend the police lacked probable cause to arrest him. However Matteucci testified that he did not arrest appellant until after Lasat had identified him as the robber. The identification and the other corroborative information we have discussed provided probable cause for an arrest.

2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212.)

Here, Lasat testified that she gave appellant money because she was afraid for "other people" in the bank, specifically, "the customers and the tellers." Since the undisputed evidence showed Lasat feared "an immediate and unlawful injury to the person or property of [others] in the company of the person robbed" (§ 212, subd. (2)), it did not matter whether Lasat was concerned for her own safety. The trial court was not obligated to instruct on the lesser offense. (*People v. Barton, supra,* 12 Cal.4th at pp. 194-195.)

Furthermore any possible error on this point was harmless. A court's failure to instruct on a lesser included offense is grounds for reversal only if it is reasonably probable that the defendant would have achieved a more favorable result absent the error alleged. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Here the majority of evidence demonstrated that Lasat was in fact afraid for her own safety. Lasat testified she was "scared" and that she was "afraid" that appellant might "shoot [her] with the . . . gun." Lasat also said she "screamed" when appellant walked out of the bank. The teller who worked next to Lasat confirmed that she was "afraid" and in "shock" immediately after the robbery.

It is true that Lasat also testified she "wasn't really afraid for [herself]" and that she "really wasn't scared." While these statements suggest Lasat maintained her composure, it is unlikely a reasonable jury would have concluded that a bank teller, confronted with a demand note from a robber who claimed to have a gun, would not have been afraid. On this record, we conclude it is not reasonably probable appellant would have achieved a more favorable result if the court had instructed on the lesser offense of grand theft. (*People v. Breverman, supra,* 19 Cal.4th at p. 162.)

C. Prosecutorial Misconduct

Lasat testified that she gave money to appellant because she was afraid of what he might do to other persons in the bank. The precise colloquy is as follows:

"Q. [Prosecutor] Why did you give the robber 1100 bucks? Why didn't you give him, maybe, one 50 and see if that would work?

"A. [Lasat] I don't know. I just -- I just -- it's just like when you are threatened, you just grab whatever they ask for just so they won't do anything.

"Q. Were you afraid for yourself?

"A. Not really, not at that time. I wasn't really afraid for myself. I was just more afraid of -- for other people.

"Q. Like what?

"A. Like the customers and the tellers. I was thinking of, actually, my son, I wasn't thinking of myself."

During final argument, the prosecutor wove this testimony into her discussion of whether there was sufficient evidence to support the element of fear necessary to establish a robbery. She argued as follows:

"By means of force or fear. What was the fear? [¶] . . . [¶] When we asked her about that, she said: I was afraid he would start shooting the tellers around her, customers. Vanessa Van Kesteren was with a customer right next to them. [¶] And then do you remember what Jinky Lasat said? She paused and her eyes kind of welled up and she said . . . If I get killed, who is going to take care of the baby? [¶] So Jinky Lasat was afraid for herself, for the people around her, for the customers in the bank. *And she feared for her family, the little boy, if something happened to her.*" (Italics added.)

Appellant now contends the portion of the prosecutor's argument that we have italicized was misconduct because it incorrectly told the jurors that the fear element of robbery can be satisfied by "the harm which a relative would suffer if the victim were injured."

Appellant failed to object to the prosecutor's argument on this ground or to request a curative admonition, so he has waived the right to raise the argument on appeal. (*People v. Lewis* (2001) 25 Cal.4th 610, 670.)

Appellant anticipates we would reach this conclusion, and he asserts a back-up position. He contends trial counsel was ineffective because she failed to object to what he describes as the prosecutor's "misstatement of the law."

A reviewing court will reverse a conviction on the grounds of ineffective assistance only if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Here, counsel may well have believed that an objection would draw attention to the prosecutor's comment and that the better tactic was to let it pass. (*Id.* at p. 582.) We conclude that would have been a reasonable choice and would not have constituted ineffective assistance.

III. DISPOSITON

The judgment is affirmed.[6]

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Jones, P.J.

We concur:

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Simons, J.

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Gemello, J.

[6] By order of this same date, we have denied appellant's petition for a writ of habeas corpus filed in A108298.